No. 840

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC & ARCTIC RAILWAY & NAVIGATION COMPANY, and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

BALLINGER, RONALD & BATTLE,
and J. D. JONES,
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

This action was instituted by the plaintiff in error against the defendants in error by the filing of a complaint August 18, 1900, in the Superior Court of King County, Washington, alleging in substance (so far as deemed material to set forth the same) the corporate capacity of the defendants in error. That on December 16, 1898, the de-

fendants in error were doing business in the Territory of Alaska and State of Washington, and that they were organized for the purpose, among other things, of constructing, building and operating a railroad from Skagway to the summit of White Pass, Alaska, and from thence to Lake Bennett, and when constructed, to do a general business as common carriers in the transportation of freight and passengers over said railroad from Skagway to said summit and from thence to Lake Bennett. That prior to December 16, 1898, they had commenced the construction of the railroad from Skagway to the summit of White Pass, and from thence to Lake Bennett, and on said December 16, 1898, said railroad was under construction and was then largely completed as far as said summit, and that the prime object in the construction of said railroad was to transport thereover freight and passengers bound and en route from Skagway to Dawson City in the Northwest Territory and other points on the Yukon River, and on said December 16th, 1898, said freight and passengers it was intended to be transported over said railroad by the defendants in error from Skagway to the summit of White Pass, and to enable said passengers and freight to reach and be transported to the gold fields at and near Dawson City and other points on the Yukon River in Alaska, that they be hauled by wagons and sleds to be drawn by livestock from said summit to Lake Bennett. That the defendants in error, fully understanding that such freight and passengers of necessity must be transported by sleds and wagons from said summit to Lake Bennett, and as an inducement to passengers and the owners of freight to

take transportation from Skagway over said railroad then being constructed, that proper and suitable provisions should be made for transporting such freight and passengers from said summit to Lake Bennett, and that it was of vital importance to defendants in error in the operation of said railroad when completed, as an inducement to have passengers and the owners of freight ship over said railroad, that such provisions be made and facilities provided for the carrying of such freight and passengers from the temporary terminus of said railroad at said summit to Lake Bennett ; and being desirous that proper and suitable facilities should be made and provided for such transportation, did on December 16, 1898, at Seattle, Washington, make a proposition to the plaintiff in error, stating that they expected to haul from Skagway to said summit about 4000 tons of freight between January 15, and April 15, 1899, and they then accepted the rate given theretofore by plaintiff in error to them of $4\frac{1}{2}$ cents per pound from said summit to Lake Bennett for the hauling and transportation by plaintiff in error of such freight, and further proposed to plaintiff in error to divide with him and other parties in proportion to their carrying capacity, and further agreed to allow the sleds, harness and horses of plaintiff in error to be used in packing and hauling said freight from said summit to Lake Bennett, to be repaired at their blacksmith shops along the trail, and asked for an acceptance of said proposition from plaintiff in error. That prior to the making by the defendants in error to the plaintiff in error of said proposition, a conversation was had between plaintiff in error and

the agent and general traffic manager of the defendants in error, covering the matters above alleged, and further during said conversation plaintiff in error stated to said agent and general traffic manager, that he did not at that time own the necessary horses, sleds, etc., to do said freight business, but that he would provide himself therewith, and haul such freight, but that he would not so provide himself unless the defendants in error agreed to and would in good faith furnish him with the freight so to be carried, and that should he, (plaintiff in error) provide himself with such proper facilities, that he should expect and did expect the defendants in error, through their said agent and general traffic manager, in good faith to furnish and provide him with such freight as provided in said written proposal. That said written proposition of the defendants in error was received by the plaintiff in error on December 16, 1898, and was by plaintiff in error on December 17, 1898, at Seattle, Washington, in writing accepted by him, and he agreed to provide himself with the proper facilities; and that after December 17, 1898, relying upon the promises and agreements made as aforesaid, he purchased and procured twenty head of horses, and harness for each thereof, and the necesssary sleds, tools, implements, appliances, etc., at a total cost to him of $7,000 and took the same to said summit, and was in readiness to transport and haul such freight, all of which facts were fully known to defendants in error.

That at the time of making said contract, it was the expectation of both of the parties thereto, that said railroad would be completed and ready for operation to said sum-

mit by January 15, 1899, and plaintiff in error had procured said horses, etc., and was in readiness to enter upon the performance of said contract as early as January 10, 1899, but said railroad was not completed or ready for operation until February 17, 1899. That defendants in error intentionally and willfully broke and violated their said agreement, and willfully diverted from plaintiff in error to other parties all of the freight transported between said summit and Lake Bennett, and during the period of time covered by said contract, large and immense quantities of freight, to-wit: about 200 tons per day, was transported over said railroad, and that but for the violation of said contract, the plaintiff in error would have earned the gross amount of $220.00 per day for each team of two horses, and that by reason of the violation of said contract, plaintiff in error suffered damages in the sum of $50,000. (Record 1-8.)

Defendants in error filed their petition for removal of this cause from the State court to the Circuit Court of the United States for the District of Washington, Northern Division, on the ground of diverse citizenship, accompanying said petition with a bond on removal. The said petition for removal alleged, so far as regards the defendant in error, British Columbia-Yukon Railway Company, "that the same is a corporation duly formed, etc.," and furthermore alleged that the plaintiff in error was and is a citizen and resident of the state of Washington; and that the defendant in error Pacific & Arctic Railway & Navigation Company was and is a corporation organized and existing under and by virtue of the laws of the state

of West Virginia and that the defendant in error, British Columbia-Yukon Railway, is a corporation duly formed and existing under and by virtue of an act of the provincial legislature of the Province of British Columbia, Dominion of Canada, with its principal place of business at Victoria, in the Province of British Columbia, the place of its domicile. (Record 9-13.)

It will be observed, therefore, that the defendant in error, Pacific & Arctic Railway & Navigation Company was a corporation organized under the laws of the State of West Virginia, while the defendant in error, British Columbia-Yukon Railway Company, is a foreign corporation organized and existing under and by virtue of an act of provincial legislature of the Province of British Columbia, Dominion of Canada. It will furthermore be observed, that as regards the defendant in error British Columbia-Yukon Railway Company, said petition only alleged that "defendant is a corporation" but did not allege that the same "was" at the time of the institution of this suit or at any other time, a corporation organized as aforesaid.

Plaintiff in error in the state court objected to the granting of said petition for removal, for the reason and upon the ground that said Circuit court of the United States was without jurisdiction to hear and determine the same. (Record 15.)

The State court, however, granted said petition, and in addition thereto permitted the defendants in error to amend their petition for removal by inserting therein the words "was and" preceding the word "is," making the petition for removal read, so far as regards the British

Columbia-Yukon Railway Company, "was and is a corporation formed, etc.," to which permission to amend and order of removal plaintiff in error objected and excepted. (Record, 16-17.)

Upon the filing of the transcript upon removal in the Circuit court of the United States, plaintiff in error filed his motion to remand to the State court, on the ground that the said Circuit court was without jurisdiction to hear and determine the case (Record 18), which motion was denied by the Federal court (Record 25); and by reference to pages 19 to 24 of the record will be found the opinion of Judge Hanford setting forth his reason for denying the same.

Thereafter, defendants in error filed their answer, admitting certain allegations of the complaint and denying other allegations. (Record, 26-28.)

The case came on duly for hearing before the court and a jury, and a verdict having been rendered in favor of the defendants in error and the motion of the plaintiff in error for a new trial having been overruled and denied, and judgment rendered in favor of the defendants in error, plaintiff in error has brought the case to this court by writ of error (Record 29-65), and has made the following assignments of errors:

I.

That the United States Circuit court, in and for the District of Washington, Northern division, erred in over-

ruling the motion filed in this cause in this court by plaintiff to remand this case to the Superior court of King County, Washington, in which said cause was instituted, and in making, rendering and entering the judgment herein overruling and denying said motion.

II.

The court further erred in admitting, over the objection of the plaintiff, the testimony of L. H. Gray, a witness for the defendants, the full substance of which testimony is as follows:

That after the plaintiff arrived in Alaska with his horses, sleds, outfits, etc., I, L. H. Gray, notified him personally that we (meaning the defendant companies) could not give him any freight on account of the high rates he wanted for hauling the same from the summit of White Pass to Lake Bennett, and I notified him, the plaintiff, and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett; whereupon the plaintiff stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told him the freight must be hauled for in order that we could compete with the Dyea trail.

And in receiving in evidence defendant's exhibit No. 2 referred to and set forth in the bill of exceptions; and in permitting said witness to testify that he notified plaintiff that he must make still lower cut to Lake Bennett, and that plaintiff then stated that he did not want freight upon those rates.

III.

Error of the court in sustaining the objections of the defendants to the following questions propounded by the attorney for the plaintiff to the witness R. M. Hester:

Q. Are you acquainted with one J. A. Powell?

A. I am.

Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken up to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between himself and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett?

To which questions counsel for the defendants interposed the following objection:

"I object for the reason that any statements of this witness, unless made in our presence, would be improper and not rebuttal testimony." Which objection the lower court sustained.

ARGUMENT.

The plaintiff in error contended that the lower court erred in overruling his motion to remand this cause to the Superior court of King county, and in making and rendering the judgment overruling said motion.

(*a*) It will be borne in mind as a conceded fact in this case, that one of the defendants in error is a corporation organized under the laws of the state of West Virginia, while the other defendant in error is an alien, being organized and existing under and by virtue of an act of the

provincial legislature of the Province of British Columbia, Dominion of Canada.

The rule applicable, therefore, to the facts of this case, is tersely stated in Black's Dillon on Removal of Causes as follows:

"Consequently, the defendants cannot remove a suit, although he is an alien, if it is brought in a court of the state in which he has a residence. Further, an alien defendant cannot remove the suit unless he is the only defendant, or unless all the other defendants are also aliens. Nor can he remove the suit if one or more of the plaintiffs is an alien. The language of the constitution and of the removal act, 'a controversy between citizens of a state and foreign states, citizens or subjects,' applies only to cases where all the parties on one side of the controversy are citizens of one of the states and all the parties on the other side of the controversy are aliens."

Black's Dillon on Removal of Causes, Section 68.

"When there are several plaintiffs or several defendants in the cause, and a removal is asked on the ground of diverse citizenship, it is necessary that all of the parties on one side of the controversy (except merely nominal or formal parties, or parties improperly joined, whose citizenship may be disregarded) should be citizens of a different state or states from all of the parties on the other side. * * * * * It is therefore necessary that all the parties on one side of the case should be citizens of a state or states and all the parties on the other side aliens. If the defendant is an alien and one of the plaintiffs is also an alien, though the others are citizens of a state, the Federal court has no jurisdiction. If there are two plaintiffs, one of whom is a citizen of the same state with the defendant and the other an alien, or if there are two defendants, one of whom is a citizen of the same state with the plaintiff and the other an alien, the case is not removable because the community of citizenship will prevent it. But a different question is presented when a plaintiff, citizen of the state

where the suit is brought, sues two defendants, one of whom is a citizen of another state and the other an alien. Here there is no community of citizenship between any of the parties. Yet the cause is not removable because it does not come within any of the provisions of the statute. It is 'casus omissus.' It cannot be said to be a controversy 'between citizens of different states,' because one of the parties is not a citizen; and it cannot be described as a controversy 'between citizens of a state and foreign citizens or subjects,' because one of the defendants is not a foreigner.''

Black's Dillon on Removal of Causes, Section 84.

See also:

Desty's Federal Procedure, Vol. 1 (9th ed.), page 472.

Tracy vs. Morel, 88 Fed. 801.

Connely vs. Taylor, 2d Peters, 556.

Sawyer vs. Switzerland, etc., Fed. Cases No. 12408.

Rooker vs. Crinkley, 18 S. E. 56.

Woodrun vs. Clay, 33 Fed. 897.

Calderwood vs. Braly, 28 Cal. 97.

People vs. Hager, 20 Cal. 167.

Welch vs. Tennant, 4 Cal. 203.

Crane vs. Sutz, 30 Mich. 453.

We also call attention to the case of *King vs. Cornell,* 106 U. S. 395. On page 398 of this case, as will be observed from the language of the court, an alien was denied the right to remove the case from the State to the Federal court because the law of 1875 (which repealed Sec. 639 of the Revised Statutes) did not *expressly* grant him the

right of removal when made a joint defendant with a citizen of the United States; the court holding that the Act of 1875 did not give the right of removal to an alien even though a separable controversy existed.

This, therefore, we submit, is an authority bearing upon the proposition at bar, and the court in this case denying the right of removal because Congress had not expressly granted the same, we submit is an authority upon the case at bar, and supports the contention of the text writers above cited, that Congress not have *expressly* granted the right of removal where an alien is sued with a citizen, such right of removal does not exist.

In *Merchant's Cotton Press Co. vs. Ins. Co. of N. A.*, 151 U. S. 368, the court on page 386 says:

"* * * * * besides it is settled by *King vs. Cornell,* 106 U. S. 395, that subdivision 2 of Section 639 of the Revised Statutes was repealed by the Act of 1875 so that an alien sued with a citizen had no right of removal, and this subdivision two of that section was not restored by the act of March 3, 1887; hence an alien in the position of the alien petitioners in the present case, would have no right to remove the cause on the ground of a separable controversy."

(*b*) Furthermore, the amendment made to the petition for removal not being within the time defendants in error were required by the laws of the State of Washington to answer or plead to the complaint of the plaintiff in error, could not be amended in the particular in which the same was amended.

Black's Dillon on Removal of Causes, Secs. 163 and 181.

(*c*) The petition for removal, even as amended, is

faulty, in that it fails to allege the necessary jurisdictional facts entitling the defendants in error to remove said cause to the Federal court.

The complaint of the plaintiff in error does not allege the citizenship or place where the defendant in error, British Columbia-Yukon Railway Company was organized (Record 1); but defendants in error in their petition for removal, set forth for the first time the fact that the same was a corporation incorporated under an act of the provincial legislature of the Province of British Columbia. The petition, however, as amended, reads that each of the defendants in error "was and is a corporation duly formed and existing under and by virtue of the laws of West Virginia and the Province of British Columbia respectively," (Record, 9-10.)

It now appears from the record of this case that either of the defendants in error was at the *time* of the institution of this suit corporations organized as aforesaid.

" * * * * Furthermore, since the Federal court will not take jurisdiction of the cause unless the requisite diversity of citizenship between the parties existed at the time of the commencement of the action in the state court, as well as at the time the removal is asked for, a petition which merely alleges that one or other of the parties 'is' a citizen of a given state will not be sufficient. The Federal court will not be enabled to take jurisdiction unless the petition distinctly alleges the relative citizenship of the parties at the time of the institution of the suit in the state court, and also at the time of the filing of the petition for removal and shows that it was then, and still is diverse."

Black's Dillon on Removal of Causes, Sec. 181, p. 284.

" * * * * It is otherwise under the judiciary act, where it must be affirmatively shown that the requisite citizenship existed at the commencement of the action."

Desty's Fed. Procedure, Vol. 1 (9th ed.), Sec. 108, p. 523.

The right of removal must be determined by the pleadings at the time the petition is filed.

Graves vs. Corkin, 132 U. S. 571.

Merchant's Cotton Press Co. vs. N. A. Insurance Co., 151 U. S. 368.

A petition for removal which alleges the diverse citizenship in the present tense is defective.

Stevens vs. Nichols, 130 U. S. 130.

Brown vs. Allen, 132 U. S. 27.

Campaign vs. Hall, 137 U. S. 61.

Crohore vs. Ohio, etc., 131 U. S. 240.

The lower court erred in admitting over the objections of the plaintiff in error, the testimony of one L. H. Gray, a witness for the defendants in error as set forth in the second assignment of error.

By reference to the first exception taken by plaintiff in error (Record, 36-48) it will be observed that the plaintiff in error introduced in evidence testimony tending to establish the contract as alleged by him. Said Gray was then, over the objection of the plaintiff in error, permitted to give testimony tending to show that said contract was either rescinded or modified, and the defendants in error exhibit No. 2 admitted in evidence by the lower court over

the objection of the plaintiff in error, had the same effect. Said Gray was permitted to testify as follows:

"After Mr. Roberts arrived in Alaska with his teams, outfit, etc., I notified him personally that we could not give him any freight on account of the high rates wanted from the summit to Lake Bennett, and I notified him and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett, whereupon the plaintiff (Roberts) stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told him that the freight must be handled for in order to compete with the Dyea trail."

That after said Roberts arrived in Alaska with his horses, teams, outfit, etc., that he, the plaintiff, signed a document received in evidence marked "Defendants' Exhibit No. 2," which is as follows:

"Skagway, Alaska, February 15th, 1899.

Mr. L. H. Gray, G. T. M., W. P. & Y. R., Seattle, Washington.

Dear Sir:—We, the undersigned, hereby agree to protect the following freighters' rates during good sledding:

Between Heney and Summit.....1c per pound
Between Summit and Log Cabin.....1c per pound
Between Summit and Lake Bennett.....2c per pound
Between Log Cabin and Lake Bennett..1c per pound

If absolutely necessary to protect Dyea competition and packers' rates from Skagway, we will confer with you and arrange some satisfactory basis of rates.

Yours truly,
G. W. ROBERTS,"

And that thereafter the said Gray notified plaintiff that he must make a still lower cut in the freight rate from the summit to Lake Bennett, and that the plaintiff stated that he did not want any freight upon those rates, to the admission of all of which said testimony and of said paper

writing marked Defendants' Exhibit No. 2, the plaintiff duly excepted, which exception was allowed by the court.

It is respectfully submitted that the effect of this testimony and exhibit tended to show, if not the entire rescission or release of said contract, at least a modification thereof.

By reference to the answer of defendants in error (Record, 26-28) and the pleadings of this cause, it will be observed that no new matter in confession or avoidance of said contract as alleged by plaintiff in error, was pleaded by the defendants in error, and in fact the answer of the defendants in error is merely an answer of general traverse, simply admitting or denying the allegations of plaintiff's complaint.

"A release or rescission and all matters in avoidance of a cause of action, must be specially pleaded by the defendant."

Ency. of Pleading & Practice, Vol. 1, pp. 849 and 851.

We submit that the instruction given by the court to the jury touching this matter did not have the effect of curing the error in admitting in evidence said testimony and exhibit (Record, 47-48).

The lower court erred in sustaining the objection propounded to the witness R. M. Hester, as set forth in the third assignment of error (Record, 54).

The detailed facts touching this matter are as set forth in exception No. 2 (Record, 44-47), from which it appears that this cause was set for trial on June 25, 1901, and that after the same was set for trial, the defendants in error made application to the court for a continuance

on the ground that one J. A. Powell was a material witness on behalf of the defense; and the application for continuance set forth that said Powell, if present, would testify that the plaintiff in error did not at the time of making the alleged contract set forth in his complaint, or at any time thereafter, have any pack horse or other animals at Skagway that he could use for the purpose of packing, etc., as alleged by plaintiff in error.

To avoid a continuance of the cause plaintiff in error agreed that the said Powell would so testify if present. Said admission was introduced in evidence and to contradict and rebut such testimony, the plaintiff in error introduced one R. M. Hester, and the questions and answers and the ruling of the court which it is claimed constituted error, are as follows:

"Q. Are you acquainted with one J. A. Powell?"
"A. I am."
"Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between himself and the defendant companies in this case for the transportation of freight from the summit to Lake Bennett?"

To which questions counsel for the defendants in error interposed the following objection:

"I object for the reason that any statement of this witness unless made in our presence, would be improper and not rebuttal testimony." Which objection was allowed by the court (Record, 46).

The sole ground, therefore, of the objection to the question and proposed testimony, was, that inasmuch as the

statements made by said Powell were not made in the presence of the defendants in error, the same would be improper, and not rebuttal testimony.

We submit that this objection was not valid or tenable, and that the court erred in sustaining the objection to the proposed testimony, upon the grounds made by counsel for defendants in error.

The proposed testimony was not obnoxious to the objection that the same was either improper or not rebuttal testimony. Furthermore, the objection of being improper is so general that a valid objection could not be predicated thereon, and such testimony certainly was proper rebuttal testimony.

Thompson on Trials, Vol. 1, Sec. 693, 694.

"Where the objecting party states the ground of his objection, it is incumbent upon him, if he would save an exception to the overruling of it, which will be available on error or appeal, to state a valid ground. If he fails to do this, his objection will not avail him, although he might have stated a valid ground." * * * *

Thompson on Trials, Vol. 1, Sec. 698.

See also:

Thompson on Trials, Sec. 690.

We submit that the only valid ground of objection that could have been interposed to the question proposed to the witness Hester, was that the same impeached or contradicted the witness Powell without the attention of the witness Powell being directed to the statement at the time, place and circumstance thereof. Suffice it, however, to say that the objection was not made upon this ground.

Furthermore, it will be remembered that Powell was not a witness in person. It was simply admitted that if he were present he would testify as set forth in said appli-

cation for a continuance, and the plaintiff in error never had the opportunity of propounding to him an impeaching question.

In any event the correct rule is set forth by Thompson on Trials, Volume 1, Section 498, as follows:

"The grounds on which the foregoing rule, which requires a foundation to be laid by first interrogating the witness on cross-examination, is usually put, is that it is the right of the witness to have the opportunity of explaining. If it is a *privilege* personal to him, it would seem to follow that it can not be *waived* by the party whose witness he is, without his consent; but that if the impeaching testimony is introduced without the foundation first being laid, he has the *right* of subsequent explanation. We find, however, that it has been held competent for a coroner's clerk to read, for the purpose of contradicting a witness in a criminal trial, his previous deposition, taken before the coroner and subscribed and sworn to by him, without asking him on cross-examination concerning the making of such deposition, where no objection is made to the reading of it on that score."

So that in the case at bar the objection was not made to the testimony of the witness Hester upon *that score.*

The testimony of the witness Hester was of vital importance to the plaintiff in error. To avoid a continuance of the cause he was willing to admit that the witness Powell would testify that the plaintiff in error did not, at the time of the making of the alleged contract or at any time thereafter, have any pack horses or other animals at Skagway or elsewhere that he could have used for the purpose of packing, drawing or hauling goods, wares and merchandise as alleged by him in his complaint, and that he was not at that time, or thereafter, possessed of any facilities, appliances, tools, machinery or otherwise, for

packing, drawing or hauling goods from White Pass to Bennett or anywhere else, etc.

This admission was offered in evidence by the defendants in error.

Now it was proposed to prove by the witness Hester, that this same witness Powell stated to him that horses were taken by Roberts to Alaska for the purpose of carrying out the contract claimed by Roberts, plaintiff in error, to have then existed between him and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett. How can it be said that the jury did not find that Roberts did not equip himself with the necessary outfit or take the same to Alaska for the purpose of carrying out said contract? But if all of the testimony in this case was before this court we believe that this court would conclude that the jury believed from the evidence that Roberts did not equip himself or provide himself with the requisite facilities for the carrying out of the contract. He was denied the privilege of disproving the statement of the witness Powell upon this most important and vital proposition.

For the reasons above set forth, it is respectfully submitted that this cause should be reversed and remanded for a new trial.

Respectfully submitted,
BALLINGER, RONALD & BATTLE,
and J. D. JONES,
Attorneys for Plaintiff in Error.